



November 19, 2002

Ms. Amanda Crawford  
Assistant Attorney General  
Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2002-6598

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171677.

The Office of the Attorney General (the "OAG") received a request for "[a]ny and all documentation, memos, letters and notes, including but not limited to, written or electronic (e-mail) communications between CVC or CVS staff involving Child Abuse and Beyond, Child Abuse & Forensic Services, Brenda Garison or Brenda Garrison." You inform us that the OAG has released a large amount of responsive information to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The informer's privilege, incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). *See also Roviato v. United States*, 353 U.S. 53, 59 (1957). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as

those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The entire statement of an informant may be withheld where it would tend to identify him or her. Open Records Decision No. 434 (1986).

Concerning the policy behind the informer's privilege, in Open Records Decision No. 515, (1988), this office quoted Wigmore as follows:

The privilege applies to communications to such officers only as have a responsibility or duty to investigate or to prevent *public wrongs*, and not to officials in general. This ordinarily signifies the police and officials of criminal justice generally. But it may also include administrative officials having a duty of inspection or of law enforcement in their particular spheres. The truth is that the principle is a large and flexible one. It applies wherever the situation is one where without this encouragement the citizens who have special information of *a violation of law* might be deterred otherwise from voluntarily reporting it *to the appropriate official*. (Emphasis added; emphasis in original deleted.)

ORD 515 at 5, quoting Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961).<sup>1</sup>

You inform us that the Sexual Assault Prevention and Crisis Services Act ("SAPCSA") created the Sexual Assault Prevention and Crisis Service Division at the OAG. Gov't Code § 420.004(a). You state that

[t]he Sexual Assault Prevention and Crisis Service Program of the OAG provides funding and technical assistance to sexual assault programs and some special projects throughout the state. The program writes and distributes training manuals for law enforcement, medical personnel, and sexual assault staff and volunteers. The program is mandated to provide the evidence collection protocol for sexual assault forensic evidence collection and the pseudonym form for survivors of sexual assault who do not wish to reveal their identities. Training for medical and criminal justice professionals is also provided.

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<sup>1</sup>In this regard, we note that the informer's privilege exists at common-law. In contrast, a cause of action created under the Whistleblower Act, chapter 554 of the Government Code, is purely statutory. See *City of San Antonio v. Heim*, 932 SW2d 287, 290 (Tex. App.- San Antonio [3 Dist.] 1996, writ den'd). Thus, the fact that a governmental body may assert the common-law informer's privilege does not establish that it can be considered a "law enforcement authority" as that phrase is used in section 554.002 of the Government Code.

You further state that the SAPCSA authorizes the OAG to adopt rules relating to assigning service areas, monitoring services, distributing funds, and collecting information from sexual assault programs. You state that the law additionally requires the OAG to adopt rules establishing minimum standards for the training and certification of a Sexual Assault Nurse Examiner ("SANE"). *See* Gov't Code § 420.011; 1 TAC § 62.25 *et. seq.*

You inform us that the information at issue contains a report of violations of civil and criminal statutes allegedly committed by an OAG-certified SANE, including sections of the Nursing Practice Act, chapter 301 of the Occupations Code. *See* Occ. Code §§ 301.501, .502 (providing for imposition of administrative penalty and amount of penalty for person licensed or regulated by Board of Nurse Examiners who violates chapter 301 or a rule or order adopted thereunder). You state that

this report was made by the informer to the governmental body believed to be the appropriate law enforcement or administrative agency that handles such matters. Although the OAG's authority is statutorily defined and limited with respect to criminal matters, the OAG is the administrative agency that oversees the SANE certification program.<sup>2</sup>

You represent that the OAG is the administrative agency with the duty to oversee and inspect the SANE program. You do not represent that the OAG has authority to investigate or prosecute the alleged violations of laws at issue here. However, we do not believe this lack of enforcement authority defeats the OAG's informer's privilege claim. In Open Records Decision No. 377 (1983), this office found the informer's privilege to be applicable in a situation where affidavits alleging criminal conduct on the part of a city employee were submitted to the supervisor of a city department, who subsequently delivered them to the city's personnel office and to the police department. In that case, we ruled that, notwithstanding the fact that the supervisor lacked the authority to investigate the allegations or enforce the law, the informer's privilege protected the identities of the informants. We noted that "[i]f the allegations are correct, violations of criminal statutes have clearly occurred."

Given the OAG's statutorily-mandated role in sexual assault prevention and crisis services, that the OAG is charged by statute with oversight of the SANE program, that the alleged

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<sup>2</sup>You further note that section 301.417 of the Occupations Code specifically makes confidential a report made under the Nursing Practice Act to the Board of Nurse Examiners and the identity of the person making the report. Additionally, you state that section 420.010 of the Government Code makes confidential any information received from reports, collected case information, or on-site monitoring visits that would identify a person working at or receiving services from a program. You assert that while the submitted information does not fall under that statute, this provision of the SAPCSA makes clear the legislature's intent that identifying information concerning individuals working at a sexual assault program must be held as confidential.

violations of law were allegedly committed by an OAG-certified SANE, and that if the allegations are correct, violations of the law have occurred, we similarly conclude that the informer's privilege is applicable in this instance. Upon review of the documents at issue, we agree that in this case, release of the contents of one of the documents would reveal the informer's identity, and thus, this document, which we have marked, must be withheld in its entirety under section 552.101. With regard to the remaining submitted document, we conclude that only the information directly identifying the informant may be withheld under section 552.101 in conjunction with the informer's privilege. We have marked the information to be withheld from this document. As we are able to make this determination, we need not address your argument under section 552.136.

To summarize, the OAG may withhold the information we have marked under section 552.101. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 171677

Enc: Submitted documents

c: Ms. Brenda Garrison  
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(w/o enclosures)